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No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I.

THE SIXTH CIRCUIT'S OPINION IS NOT CONSISTENT WITH THIS COURT'S DECISION IN *STONE V. GRAHAM* 1

II.

RESPONDENTS' RELIANCE ON THE PRIOR HISTORY OF THE DISPLAYS ILLUMINATES THE SPLIT AMONG THE CIRCUITS AND ILLUSTRATES THE IMPORTANCE OF THIS COURT'S RESOLUTION OF THE LEGAL EFFECT TO BE GIVEN TO A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL ACTION 4

A. Respondents Do Not Dispute The Circuit Split On The Issue Of The Legal Effect Of A Governmental Entity's Alleged Past Unconstitutional Purpose 5

B. Respondents' Reliance On Past Conduct To Taint A Present Constitutional Display Illustrates The Necessity Of A Decision By This Court On This Issue Of Great Public Importance 6

III.

THERE IS A SIGNIFICANT CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE CONSTITUTIONALITY OF DISPLAYS OF THE TEN COMMANDMENTS 7

IV.

THE PROCEDURAL POSTURE OF THIS CASE SHOULD NOT DISCOURAGE THIS COURT FROM REVIEW. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page(s)**

ACLU v. Grayson Cty.,
2002 WL 1558688 (W.D. Ky. 2002) 9

ACLU v. Mercer County,
219 F. Supp. 2d 777 (E.D. Ky. 2002) 8

ACLU v. Schundler,
168 F.3d 92 (3rd Cir. 1999) 5

Adland v. Russ,
307 F.3d 471 (6th Cir. 2002) 5

Ashcroft v. ACLU,
124 S.Ct. 2783 (June 29, 2004) 10

Books v. City of Elkhart,
235 F.3d 292 (7th Cir. 2000) 8

City of Elkhart v. Books,
121 S. Ct. 2209 (2001) 2

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 3

Freethought Society v. Chester Cty.,
334 F.3d 247 (3d Cir. 2003) 8

Granzeier v. Middleton,
173 F.3d 568 (6th Cir. 1999) 5

Lynch v. Donnelly,
465 U.S. 668 (1984) 2, 8

Metzl v. Leininger,
57 F.3d 618 (7th Cir. 1995) 5

Stone v. Graham,
449 U.S. 39 (1980) 1-4, 7

Van Orden v. Perry,
351 F.3d 173 (5th Cir. 2003) 7

I.

THE SIXTH CIRCUIT'S OPINION IS NOT CONSISTENT WITH THIS COURT'S DECISION IN *STONE V. GRAHAM*.

Respondents spend a large portion of their Brief arguing that the Sixth Circuit's decision in this case represents nothing more than a mechanical application of this Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980). Respondents argue that the articulated purpose in this case is identical to the articulated purpose in *Stone* and, therefore, *Stone* mandates that the Sixth Circuit's decision was correct. Nothing could be further from the truth.

In *Stone*, the Supreme Court, in what Justice Rehnquist termed a "cavalier summary reversal", *id.* at 47, held unconstitutional a statute that mandated the display of the Ten Commandments on the walls of Kentucky classrooms. The Court rejected the State's articulated purpose. *Id.* The Ten Commandments hung by themselves on the walls of the classroom and Kentucky made no attempt to place the Ten Commandments in context with secular legal documents. The fact that the Ten Commandments hung by themselves was the determinative factor in this Court's rejection of the articulated secular purpose. That is why this Court noted, "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function." *Id.* at 42 (citation omitted). This Court specifically acknowledged that

the Ten Commandments could be placed in context with other appropriate secular literature or documents.

If there was any doubt about this conclusion, this Court made it clear that *Stone* does not stand for the broad, sweeping holding urged by the Respondents in this case. This Court has explained the reach of *Stone* in *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Lynch* dealt with the constitutionality of a creche displayed on government property. This Court stated:

> In this case, the focus of our inquiry must be on the creche in the context of the Christmas season. *See, e.g., Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam); *Abington School District v. Schempp*, supra. In *Stone*, for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But **the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."**

Lynch, 465 U.S. at 679 (emphasis added). The statute in *Stone* had no secular purpose because the Ten Commandments were displayed alone "purely as a religious admonition." Had the document been displayed in broader context, the case would have been much different. Additionally, in their dissent from the denial of certiorari in the case of *City of Elkhart v. Books*, 121 S. Ct. 2209 (2001), Chief Justice Rehnquist, together with Justices Scalia and

Thomas explained the *Stone* case as follows:

> *Stone's* unique setting may explain our reluctance to accept in that case the State's view that its display of the Commandments had a secular purpose. But **we have never determined in *Stone* or elsewhere, that the Commandments lack a secular application**. To be sure, the Ten Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, "the religious duties of believers." **Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes**. Even *Stone* noted that "integrated into the school curriculum" the Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics." And as the Court of Appeals recognized, "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."

Id. at 2211 (Rehnquist, C.J., dissenting)(emphasis added).

Justice Stevens, concurring and dissenting in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), likewise demonstrates the fact that *Stone* does not result in a broad, *per se* invalidation of every Ten Commandments display as urged by the respondents in this case. In his opinion, Justice Stevens stated, "For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an **equivocal** message, perhaps of respect for

Judaism, for religion in general, or for law." *Id.* at 652-53 (emphasis added). Thus the Ten Commandments alone might convey a message of (1) respect for Judaism, or (2) religion in general, or (3) law. Placing other religious images beside the Ten Commandments would tip the scale from "equivocal" to "religious." Adding secular images tips the scale from "equivocal" to "secular." Justice Stevens then noted, "Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders [Moses, Confucius and Mohammed], however, signals respect not for great proselytizers but for great lawgivers." *Id.* The exact situation is presented in this case. This case is factually and completely different from *Stone* and the Sixth Circuit's opinion in this case is not the result of a mechanical application of the principles outlined in *Stone*. While it is true that this Court rejected Kentucky's asserted secular purpose twenty years ago in *Stone*, it is also true that the case would have been different if the Ten Commandments appeared in the context of a larger display. This is that case.

II.

RESPONDENTS' RELIANCE ON THE PRIOR HISTORY OF THE DISPLAYS ILLUMINATES THE SPLIT AMONG THE CIRCUITS AND ILLUSTRATES THE IMPORTANCE OF THIS COURT'S RESOLUTION OF THE LEGAL EFFECT TO BE GIVEN TO A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL ACTION.

Respondents rely heavily on the prior history of the

governmental entities in this case to demonstrate their claim of unconstitutionality. Their heavy reliance on past history demonstrates the split among the Circuit Courts as to the legal effect to be given to such prior history and also demonstrates the precise reason why this Court should grant certiorari to resolve this issue of great public importance.

A. Respondents Do Not Dispute The Circuit Split On The Issue Of The Legal Effect Of A Governmental Entity's Alleged Past Unconstitutional Purpose.

Respondents never dispute the existence of a clear split among the Circuit Courts on the issue of the legal effect to be given to a governmental entity's past alleged unconstitutional purpose. The Sixth Circuit's decision in this case clearly conflicts with the Third Circuit's decision in *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), and *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002). Respondents never dispute the existence of this split among the Circuit Courts. If Petitioners were located in either the Third or Seventh Circuits, they would be allowed to change their past conduct to conform to constitutional standards without the change in the conduct reflecting negatively on their *current* articulation of a secular purpose. The *Schundler*, *Metzl*, *Granzeier* and *Adland* cases all allow a Defendant to change its conduct to bring itself within constitutional boundaries. The Sixth Circuit's decision stands in stark contrast to the decisions from these Circuits and Respondents do not dispute this conflict.

B. Respondents' Reliance On Past Conduct To Taint A Present Constitutional Display Illustrates The Necessity Of A Decision By This Court On This Issue Of Great Public Importance.

Respondents' insistent reliance on past conduct to taint present constitutional actions illustrates precisely why this Court must accept this case to resolve this issue. The split among the Circuit Courts must be resolved by this Court because the resolution of this important legal issue has far-reaching ramifications for governmental entities caught in an Establishment Clause challenge. If a governmental entity missteps once in the Establishment Clause minefield, it can never correct its action under the Sixth Circuit's decision. The Sixth Circuit's decision leaves governmental entities with one option in remedying an actual or alleged constitutional violation - remove the display. The Sixth Circuit's decision and the undue weight it places on past unconstitutional conduct puts government between the Scylla of flouting the law and the Charybdis of having their past action counted against them in any future change seeking to bring the government within constitutional boundaries. Left unchecked, the Sixth Circuit's decision will unfairly handicap governmental entities in Establishment Clause cases. A "one strike and you are out" policy under the Establishment Clause is highly inappropriate in an area of the law that is subject to such change and uncertainty, even among the members of this Court. Government must be given the leeway to change its conduct to bring itself within constitutional boundaries. This Court must accept this case for the purpose of allowing such beneficial change.

III.

THERE IS A SIGNIFICANT CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE CONSTITUTIONALITY OF DISPLAYS OF THE TEN COMMANDMENTS.

Respondents claim that "The courts of appeals have consistently applied *Stone* to strike down many displays of the Ten Commandments at the seat of government." Such a statement simply misses the significant conflict that exists among the Circuit Courts on the issue of the constitutionality of the display of the Ten Commandments. The Respondents gloss over the significant conflict by attempting to attribute the deep conflict among the Circuit Courts as simply factual variations in different cases, such as the age of the displays, and the fact that the articulated purposes were different. Nothing, though, can simply make the deep conflict among the Circuit Courts on the constitutionality of displays of the Ten Commandments disappear.

Factual distinctions in the cases cannot overshadow the division among the Courts of Appeals over the constitutionality of governmental displays containing the Ten Commandments. It is clear from even a cursory reading of the cases dealing with such displays that the Courts of Appeals are in disarray over the proper test to be used in judging displays of the Ten Commandments, the weight to be given to the articulation of a secular purpose and the ultimate outcome concerning the constitutionality of such displays.

It is impossible to explain why the exact same monument was held constitutional in *Van Orden v. Perry*, 351 F.3d 173

(5th Cir. 2003), and was struck down as unconstitutional in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). It is impossible to understand why the government's articulation of a secular purpose for the display of a religious symbol in the context of other secular symbols was found to be sufficient in *Lynch v. Donnelly*, 465 U.S. 668 (1984), but was found to be insufficient in the Sixth Circuit's decision in this case. Why is a bronze plaque containing the Ten Commandments by themselves on a wall constitutional, *see Freethought Society v. Chester Cty.*, 334 F.3d 247 (3d Cir. 2003), while a display of nine historical documents, only one of which is religious, is unconstitutional? It is also impossible to explain why the present case and the case of *ACLU v. Mercer County*, 219 F. Supp. 2d 777 (E.D. Ky. 2002), came to such drastically divergent results when the displays at issue in both cases were identical. The conflict regarding governmental displays of the Ten Commandments and other religious symbols cannot be brushed aside as easily as Respondents attempt to do. The lower courts are in conflict over the proper test and weight to be applied to review of the constitutionality of governmental displays of religious symbols including the Ten Commandments. This Court must accept this case to resolve the conflict.

IV.

THE PROCEDURAL POSTURE OF THIS CASE SHOULD NOT DISCOURAGE THIS COURT FROM REVIEW.

Respondents attempt to discourage this Court from review of this important case and resolution of the conflicts among the lower courts by pointing to the fact that this case

is an appeal from a preliminary injunction. However, the procedural posture of this case is irrelevant. As the Sixth Circuit noted in its opinion, "The injunction will be disturbed if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." (App., 13a). Indeed, this case is not a factual dispute. This case is a dispute concerning the proper legal standard to be employed in judging the constitutionality of governmental displays containing the Ten Commandments. This is true considering the fact that the District Court has stayed any further proceedings in this case pending the outcome of this Petition for Writ of Certiorari. As the District Court noted in its order staying the case, "In the interests of judicial economy and efficiency, this court will stay the proceedings in this case.... Cases construing the Establishment Clause have traditionally been marked by disagreement and uncertainty, even within the Sixth Circuit." *See* December 4, 2001, Order of District Court granting stay at 2.[1] The District Court, and the Sixth Circuit recognized that this case presented a purely legal issue regarding the proper test to be used to judge the constitutionality of governmental displays of the Ten Commandments.

This Court routinely grants certiorari in cases involving appeals from a District Court's grant of a preliminary

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[1] Further, there are at least three other cases within the Sixth Circuit that have been stayed pending the final outcome of this case. *See ACLU v. Grayson Cty.*, 2002 WL 1558688, *6 (W.D. Ky. 2002); *ACLU v. Rowan Cty.*, Case No. 01-CV-220 (E.D. Ky.) (stayed pending decision in this case); *ACLU v. Rutherford Cty.*, Case No. 3-02 0396 (M.D. Tenn.) (stayed pending decision in this case).

injunction. *See, e.g., Ashcroft v. ACLU*, 124 S.Ct. 2783 (June 29, 2004). In this case, certiorari is warranted because of the legal questions and the conflicts clearly presented. This Court should accept this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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